STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 20, 2017)

LORETTA BELAC	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-16-0544**
	:	
3M COMPANY, et al.	:	
Defendants.	:	

DECISION

GIBNEY, P.J. The Plaintiff, Loretta Belac (Plaintiff), has moved for the voluntary dismissal of her Complaint brought in the above-named personal injury action relating to the Plaintiff's alleged exposure to asbestos-containing products. Following numerous defendants' motions to dismiss based on a lack of personal jurisdiction in Rhode Island, the Plaintiff has brought her motion for voluntary dismissal in order to refile the case in the State of Pennsylvania. Defendants Evenheat Kiln, Inc. (Evenheat) and Sargent Art, Inc. (Sargent Art) (collectively, Defendants) object to the Plaintiff's motion to dismiss without prejudice and request that the Court deny said Motion in order to first hear summary judgment motions brought by both Defendants. In the alternative, the two Defendants request that this Court grant the Plaintiff's motion to dismiss with prejudice with respect to Evenheat and Sargent Art. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

A

Defendant Evenheat

The Plaintiff originally filed this matter on February 9, 2016, and Evenheat served its answer to Plaintiff's Complaint on March 11, 2016. Thereafter, the Plaintiff filed two Amended Complaints on July 28, 2016 and September 8, 2016, and Evenheat filed its respective answers on August 16, 2016 and September 13, 2016. The Plaintiff served Evenheat and other defendants with master discovery on or about April 21, 2016, and Evenheat responded to the discovery requests on June 7, 2016. During the discovery phase, the Plaintiff was deposed over the course of six days from June to September of 2016, which Evenheat attended. Evenheat also participated via telephone conference in one day of trial preservation testimony on September 2, 2016.

Evenheat, unlike other defendants in the matter, never contested jurisdiction in Rhode Island and did not file a motion for lack of personal jurisdiction. Rather—after the above-mentioned discovery was conducted—Evenheat brought a motion for summary judgment on December 22, 2016 alleging a lack of product identification and insufficient causal connection. Evenheat contends that it never manufactured, sold, or distributed asbestos-containing products, nor did the Plaintiff come into contact with any such product of Evenheat's. The motion was set for a hearing on January 4, 2017. Summary judgment arguments were later set for March 29, 2017; however, as of the date of this Decision, summary judgment arguments have not yet taken place. Additionally, the Plaintiff has not yet responded in writing to Evenheat's motion for

summary judgment. Instead, on April 12, 2017, the Plaintiff brought a voluntary motion for dismissal against all defendants, including Evenheat, in order to refile the case in Pennsylvania.

B

Defendant Sargent Art

Since the Plaintiff filed her action in February of 2016, Sargent Art has responded to three Complaints filed by the Plaintiff. Sargent Art has also attended seven days of depositions of the Plaintiff and one day of trial preservation testimony. It has responded to Plaintiff's master discovery requests and, following discovery, Sargent Art filed its motion for summary judgment on January 10, 2017. In its motion for summary judgment, Sargent Art argues a lack of product identification and insufficient causal connection, contending that Sargent Art never manufactured, sold, or distributed an asbestos-containing product and that the Plaintiff did not come into contact with any such product. The Plaintiff has not yet responded with a written objection to that motion.

Following the Plaintiff's motion for voluntary dismissal against all defendants, Sargent Art submitted its objection to the Court on March 30, 2017, asking that the motion to dismiss either be denied and the matter be set down for summary judgment arguments, or, in the alternative, that the motion to dismiss be granted with prejudice.

II

Parties' Arguments

Both Evenheat and Sargent Art contend that under Rhode Island Rule of Civil Procedure 41(a)(2) (Rule 41(a)(2)), a court may grant a plaintiff's motion to dismiss upon such terms and conditions as the court deems proper. See Super. R. Civ. P. 41(a)(2). Unless otherwise specified, such a dismissal would be granted without prejudice. See id. The Defendants argue that such

motion to dismiss should not be granted when such a dismissal will prejudice a party. The Defendants contend that Rhode Island's rule is identical to Federal Rule of Civil Procedure 41(a)(2), and they note that federal courts will not grant a dismissal when it prejudices a party based on the following factors: 1) the defendant's effort and expense of preparation for trial; 2) excessive delay or lack of diligence by the plaintiff; 3) insufficient explanation for the need to grant a dismissal; and 4) the fact that a motion for summary judgment has been filed and is pending.

Alternatively, the Plaintiff contends that summary judgment is premature since there has been insufficient time for discovery. The Plaintiff noted that the matter will be refiled in Pennsylvania. The Plaintiff responds to Defendants' objections by maintaining that further discovery is needed to determine product identification and causal connection before summary judgment is ripe for argument. Thus, Plaintiff contends that the Court should grant its motion for voluntary dismissal against all defendants—including Evenheat and Sargent Art—so that she can refile her suit in Pennsylvania and discovery can continue. The Plaintiff contends that summary judgment is premature and additional time and discovery is needed before arguments can advance.

III

Standard of Review

Rule 41(a)(2) provides for a plaintiff's voluntary dismissal of an action. According to Super. R. Civ. P. 41(a)(1) (Rule 41(a)(1)), if a motion is brought before an adverse party's answer or before an adverse party's motion for summary judgment, dismissal may occur without an order of the Court. Alternatively, a Plaintiff can bring a voluntary dismissal without a Court order where all parties have signed an agreement and filed a stipulation. See Rule 41(a)(1).

Furthermore, "[u]nless otherwise stated in the [order], the dismissal [under this paragraph] is without prejudice . . ." Rule 41(a)(1).

If an adverse party has already served its answer, has filed a motion for summary judgment, or has objected to dismissal, a plaintiff may bring a motion for voluntary dismissal by order of the Court. See Rule 41(a)(2). Rule 41(a)(2) provides that, "[e]xcept as provided in paragraph (1) . . . an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Rule 41(a)(2). In such circumstances, a Court may grant the plaintiff's motion for voluntary dismissal—either with prejudice or without—despite an adverse party's objection, after a careful review of the particular circumstances of the case. See Barnes-De-Latexera v. San Jorge Children's Hosp., 62 F. Supp. 3d 212, 215 (D.P.R. 2014) (citing Colon-Cabrera v. Esso Standard Oil Co., 723 F.3d 82, 87 (1st Cir. 2013)).

The above-mentioned factors act as merely a guide for the trial judge, with whom discretion ultimately rests. See Tyco Labs., Inc. v. Koppers Co., 627 F.2d 54, 56 (7th Cir. 1980). Furthermore, no mandate exists that requires strict adherence to each and every factor, and all factors need not be resolved in favor of the moving party before dismissal is appropriate. See Doe v. Urohealth Sys., Inc., 216 F.3d 157, 160 (1st Cir. 2000).

IV

Analysis

Rhode Island's Rule 41(a)(2) is identical to Federal Rule 41(a)(2). See F.R.C.P. 41(a)(2). The Rhode Island Supreme Court has stated that "where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our own rule." Crowe Countryside Realty Assocs. Co. v. Novare Eng'rs, Inc.,

891 A.2d 838, 840 (R.I. 2006) (citing Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985)). Rule 41(a)(2) requires a court order before voluntary dismissal in cases where an adverse party has already served its answers, filed a motion for summary judgment, or where there is an objection to dismissal. See Rule 41(a)(2). By requiring the Court's approval, Rule 41(a)(2) allows a trial judge to first evaluate whether dismissal will cause prejudice to any party; such a review ensures that no prejudice will result from a voluntary dismissal. See Doe, 216 F.3d at 160 (quoting P.R. Mar. Shipping Auth. v. Leith, 668 F.2d 46, 50 (1st Cir. 1981)).

In considering whether dismissal will result in prejudice to an adverse party, a Court should consider the following factors: 1) the efforts and costs incurred by the defendants in preparation for trial; 2) excessive delay and want of diligence in the plaintiff's litigation; 3) the legitimacy (or lack thereof) of the explanation for the need to take a dismissal; and 4) whether a summary judgment motion has been filed by the defendant. See id.; see also Barnes-De-Latexera, 62 F. Supp. 3d at 215.

In the present matter, Evenheat has responded to the Plaintiff's multiple Complaints with corresponding Answers, has participated in master discovery, attended six days of Plaintiff's deposition, participated in one day of trial testimony preservation over the phone, filed a motion for summary judgment in December of 2016, prepared for oral argument (which have not yet occurred), and has never objected to jurisdiction in Rhode Island. Similarly, Sargent Art has responded to the Plaintiff's Complaints with Answers, participated in mastery discovery, attended seven days of Plaintiff's deposition and one day of trial testimony preservation, filed a motion for summary judgment in January of 2017, prepared for oral argument, and has never objected to jurisdiction in Rhode Island.

Both Defendants have objected to the Plaintiff's motion for voluntary dismissal—which the Plaintiff is requesting be granted without prejudice in order to refile the case against all defendants in Pennsylvania. Both Defendants raise issues of product identification and causal connection in their respective motions for summary judgment. Based on the level of involvement by each Defendant, this Court will consider any possible prejudice before granting the Plaintiff's motion for voluntary dismissal, according to factors promulgated by the First Circuit under F.R.C.P. 41(a)(2). See Doe, 216 F.3d at 160; F.R.C.P. 41(a)(2); Rule 41(a)(2).

With respect to the first factor promulgated by the federal courts, this Court notes that both Evenheat and Sargent Art have expended a great amount of effort in their trial preparation and have been involved in discovery since the Plaintiff first filed her Complaint in February of 2016. See Doe, 216 F.3d at 160. Furthermore, the Defendants have never objected to jurisdiction in Rhode Island and have actively participated in litigation. Second, if this Court were to grant dismissal without prejudice and allow the Plaintiff to refile against these two Defendants in Pennsylvania, such a dismissal would cause excessive delay with respect to Evenheat and Sargent Art's motions for summary judgment. See id. The Defendants' motions for summary judgment have been pending since December of 2016 and January of 2017 and have not yet made it to oral argument. Requiring both parties to reinitiate summary judgment procedures in Pennsylvania would cause an excessive, and unnecessary, delay. See id.

The third factor espoused by the First Circuit encourages the Court to evaluate the legitimacy of the request for voluntary dismissal. See id. Although the Plaintiff has diligently advanced through litigation and has legitimately requested dismissal in order to refile in the proper jurisdiction, the fourth federal factor encourages this Court to consider that Defendants have filed motions for summary judgment with corresponding legal memoranda. Accordingly,

this Court finds that a dismissal without prejudice would, at this time, cause prejudice to Defendants Evenheat and Sargent Art in light of their trial preparation and pending motions for summary judgment. See id.; see also D'Alto v. Dahon Cal., Inc., 100 F.3d 281, 283 (2nd Cir. 1996).

V

Conclusion

This Court finds that a dismissal without prejudice to all named defendants would cause prejudice to Defendants Evenheat and Sargent Art, since both have actively participated in litigation and have pending summary judgment motions. Therefore, this Court denies the Plaintiff's motion for voluntary dismissal with respect to Defendants Evenheat and Sargent Art. However, the Court grants the Plaintiff's motion for voluntary dismissal, without prejudice, with respect to all other defendants in the matter. The Court will allow one month for the Plaintiff to respond to Evenheat and Sargent Art's motions for summary judgment, and will schedule oral arguments on those motions at a later date. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Loretta Belac v. 3M Company, et al.**
CASE NO:	**PC-16-0544**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 20, 2017**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**

ATTORNEYS:

For Plaintiff:	**John E. Deaton, Esq.**
For Defendant:	**Andrew R. McConville, Esq.** **Marc E. Finkel, Esq.** **Lisa M. Kresge, Esq.** **Kevin McAllister, Esq.**